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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/426,208	03/05/2015	Etienne Lefort	104009.000213	2151

23377 7590 10/13/2020

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EXAMINER	
SASAKI, SHOGO	

ART UNIT	PAPER NUMBER
1798	

NOTIFICATION DATE	DELIVERY MODE
10/13/2020	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ETIENNE LEFORT, VINCENZO TEOLI,
ROBERT A. DEKEMP, and RAN KLEIN

Appeal 2020-000820
Application 14/426,208
Technology Center 1700

Before ROMULO H. DELMENDO, MICHAEL P. COLAIANNI, and MICHAEL G. McMANUS, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision to reject claims 1–14. We have jurisdiction under 35 U.S.C. § 6(b). Oral arguments were heard in this appeal on October 1, 2020.

We REVERSE.

[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Jubilant DraxImage Inc. Appeal Br. 1.

Appellant's invention is directed to rubidium elution control systems for use in nuclear medicine (Spec. ¶ 2; Claim 1).

Claim 1 is representative of the subject matter on appeal:

1. An $^{82}Sr/^{82}Rb$ elution system, comprising:
a $^{82}Sr/^{82}Rb$ generator;
a pump;
a processor;
a positron detector;
a patient outlet for delivery of fluid from the positron detector to a patient;
fluid flow lines comprising a feed line that permits fluid flow from the pump to the generator, a generator line that permits fluid flow from the generator to the positron detector, and a patient line that permits fluid flow from the positron detector to the patient outlet;
a user interface; and
a memory communicatively coupled to the processor, the memory bearing processor-executable instructions that, in response to being executed on the processor, cause the system to at least:
(i) begin a quality control procedure comprising an assessment of a concentration of ^{82}Rb, ^{82}Sr, or ^{85}Sr in a fluid that is eluted from the generator;
(ii) in response to completion of the assessment,
(a) generate an output on the user interface that recommends a course of action or no course of action, based on a result of the assessment, or
(b) store an indication of the result of the assessment in a memory location, and upload the indication of the result of the assessment to a computer via a communications network; and
(iii) in response to user interruption of the assessment, halting the generator.

Appellant appeals the following rejection listed on pages 5 to 11 of the Examiner's Answer:

Claims 1–14 are rejected under 35 U.S.C. § 103(a) as unpatentable over Appellant's Admitted Prior Art (AAPA) (Spec. ¶¶ 3–10, Figs. 1–2).

FINDINGS OF FACT & ANALYSIS

The Examiner's findings and conclusions regarding the rejection of claim 1 over AAPA are located on pages 5–9 of the Examiner's Answer.

Appellant argues the Examiner has not provided any evidence indicating that one of ordinary skill in the art would have modified the AAPA in the manner proposed (Appeal Br. 7; Reply Br. 3). Appellant contends the Examiner's bare allegation of obviousness is legally insufficient (Appeal Br. 8). Appellant argues that none of the references disclose or suggest a system that halts operation of an $^{82}Sr/^{82}Rb$ generator in response to user interruption of a quality control assessment (Appeal Br. 6).

Claim 1 recites a $^{82}Sr/^{82}Rb$ elution system comprising, inter alia, "a memory communicatively coupled to the processor, the memory bearing processor-executable instructions that, in response to being executed on the processor, cause the system to at least . . . begin a quality control procedure."

The Examiner's rejection is based on a series of obviousness conclusions that appear based upon suppositions as to what would have been obvious (Ans. 5–9). For example, the Examiner determines "it is also obvious that if the assessment for checking for proper function of the system is interrupted, by any causes (user or system error), the system operation is ceased for the purpose of finding out the cause of the malfunction" (Ans. 8). The Examiner, however, provides no evidence or official notice to support the obviousness conclusion. The Examiner further provides obviousness conclusions whose only support is the Examiner's statement that such a step

or structure would have been obvious (Ans. 7–9). Stated differently, the Examiner's obviousness conclusion without evidence is conclusory and fails to meet the substantial evidence standard. *See K/S Himpp v. Hear-Wear Technologies, LLC*, 751 F.3d 1362, 1366 (Fed. Cir. 2014) ("We recognize that the Board has subject matter expertise, but the Board cannot accept general conclusions about what is 'basic knowledge' or 'common sense' as a replacement for documentary evidence for core factual findings in a determination of patentability. *Zurko*, 258 F.3d [1379, 1385–86 (Fed. Cir. 2001)]. To hold otherwise would be to embark down a slippery slope which would permit the examining process to deviate from the well-established and time-honored requirement that rejections be supported by evidence. It would also ultimately 'render the process of appellate review for substantial evidence on the record a meaningless exercise.'").

The Examiner has not dispensed with the obligation to establish a prima facie case based on the preponderance of the evidence. On this record, we are constrained to reverse the Examiner's § 103 rejection.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–14	103(a)	AAPA		1–14

REVERSED